SUPREME COURT, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-17

ANN E. BIBLER, ADMX. OF THE ESTATE OF RALPH BIBLER, DECEASED, ET AL.,
Petitioners,

vs.

BERRY H. YOUNG, JR., ET AL.,

and

THE UNITED STATES OF AMERICA and THE FEDERAL AVIATION ADMINISTRATION,
Respondents.

BRIEF OF RESPONDENTS BERRY H. YOUNG, JR., ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

Title 14 C.F.R., Section 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except

in an emergency, unless he obtains an amended clearance. However, except in positive controlled airspace, this paragraph does not prohibit him from cancelling an IFR flight plan if he is operating in VFR weather conditions.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction.

(c) Each pilot in command who deviates, in an emergency, from an ATC clearance or instruction shall notify ATC of that deviation as soon as possible.

(d) Each pilot in command who (though not deviating from a rule of this subpart) is given priority by ATC in an emergency, shall, if requested by ATC, submit a detailed report of that emergency within 48 hours to the chief of that ATC facility.

STATEMENT OF THE CASE

This matter involves four (4) separate claims. The first is a wrongful death claim asserted in the case of *Ann E. Bibler, as Administratrix of the Estate of Ralph D. Bibler* v. *Berry H. Young, Jr., Ohio Aviation Company, Ohio Aviation Distributors, Inc., The United States of America and The Federal Aviation Administration,* Case No. 70-56, in the United States District Court for the Southern District of Ohio, Eastern Division. Jurisdiction in that case is based on diversity of citizenship, Title 28 U.S.C., Section 1332, and The Federal Tort Claims Act, Title 28 U.S.C., Section 1346 (b). Cross-claims were made by the United States of America against the three co-defendants in that case.

The second claim is for property damage to a Piper Cherokee airplane of which the decedent, Ralph D. Bibler, was pilot-in-command and which airplane was owned by Donald L. Sundin d/b/a Sundin Aviation Company. That claim is the subject of the case of *Donald L. Sundin d/b/a*

Sundin Aviation Company v. *United States of America and the Federal Aviation Administration*, Case No. 70-82, in the United States District Court for the Southern District of Ohio, Eastern Division. Jurisdiction in that case is based on The Federal Tort Claims Act, Title 28 U.S.C., Section 1346 (b). Third-party claims were made by the United States of America against Berry H. Young, Jr., The Ohio Aviation Company and Ohio Aviation Distributors, Inc. in that case.

The third claim is for the same property damage to the Piper Cherokee airplane and was originally asserted in the case of *Donald L. Sundin d/b/a Sundin Aviation Company* v. *Ohio Aviation Company, Ohio Aviation Distributors, Inc. and Berry H. Young, Jr.*, Case No. 23991, in the Court of Common Pleas, Franklin County, Ohio. Ohio Aviation Distributors, Inc. was the owner of the Beechcraft Bonanza 18N, and it counterclaimed against said Donald L. Sundin in that case for damage to the Beechcraft Bonanza. This is the fourth claim which is a subject of this matter. There was no diversity of citizenship or other basis for federal court jurisdiction of the subject matter in that case.

The above Cases Nos. 70-56 and 70-82 were consolidated for trial to the Court. The claims asserted in the Common Pleas Court were submitted to the District Court on the Common Pleas Court pleadings by stipulation of the parties for trial along with Cases Nos. 70-56 and 70-82. Decedent Ralph D. Bibler was an employee of Donald L. Sundin d/b/a Sundin Aviation Company. Berry H. Young, Jr. was an employee of The Ohio Aviation Company but was neither an employee nor an agent of Ohio Aviation Distributors, Inc.

The accident out of which these four (4) claims arose occurred on April 10, 1968, at Port Columbus Interna-

tional Airport (hereafter called Port Columbus) within the airport traffic area (five (5) mile radius). Port Columbus had an F.A.A. air traffic control facility which provided aircraft approach control services and tower services (local and ground). The approach control radio frequency in use was 119.OHz. The tower local control radio frequency in use was 120.5Hz. At the time of the accident, the weather conditions were such as to make the F.A.A. visual flight rules applicable.

Prior to and at the time of the accident, decedent Ralph Bibler was giving a student instrument flight instructions in Cherokee 39J on the approach course to Port Columbus Runway 28 Left. That runway lay in an easterly-westerly direction. The approach to Runway 28 Left was from east to west. On the first simulated instrument approach. Cherokee 39J was given compass directions by approach control to guide it in alignment with the approach to Runway 28 Left. Prior to the time Cherokee 39J passed the outer marker (the point at which descent was to commence), approach control told Cherokee 39J to contact the tower at the outer marker. Cherokee 39J followed those instructions and received clearance to continue his descent towards Runway 28 Left. That first simulated approach was terminated by Cherokee 39J just short of the runway when the airplane began climbing to a higher altitude and executing a right turn (missed approach). Cherokee 39J then re-contacted approach control as he had previously been instructed to do. At the time of the accident, Cherokee 39J was attempting a second simulated instrument approach. At no time did Cherokee 39J intend to land on Runway 28 Left.

At approximately 3:04 P.M., approach control informed Cherokee 39J that he was on the localizer (radio directional beam on approach course) a mile from the outer marker

and that he was spaced in reference to a Lake Central Nord located about three (3) miles north of the airport. The Nord would be landing on Runway 28 Left. Cherokee 39J acknowledged the approach control transmission. However, approach control did not instruct Cherokee 39J to contact the tower on frequency 120.5Hz at the outer marker as approach control had done on the first simulated approach. From that time (a mile from the outer marker) until the time of the mid-air collision well inside the outer marker and the five (5) mile airport traffic area, Cherokee 39J made no transmission to either approach control or to the tower local controller until the approximate time of the collision. Neither did the approach controller make any transmissions to Cherokee 39J. The tower local controller could not transmit to Cherokee 39J because at no time on the second approach did Cherokee 39J switch to the tower local controller's frequency.

At approximately 3:04 P.M., Mr. Young, piloting Bonanza 18N, called the tower local controller on frequency 120.5Hz and reported his position as two (2) miles south of the outer marker (Charlie Mike). The tower local controller instructed Bonanza 18N to plan Runway 28 Left as No. 2 aircraft, the aircraft following the Nord, which was No. 1. The only warning received concerning any other traffic was that Bonanza 18N should watch for traffic coming up on the outer marker making an instrument landing system (ILS) low approach. Low approach means without landing. After other transmissions, the tower local controller asked Bonanza 18N if he had sighted the Nord. After first responding "negative", Bonanza 18N reported identification of the Nord. A short while later the tower local controller told Bonanza 18N that he (the local controller) had the Bonanza in sight and stated, "You're cleared to land 28 Left." Bonanza 18N

acknowledged receiving this transmission. After being alerted to the fact that the two (2) airplanes were in close proximity on the approach to Runway 28 Left, the tower local controller attempted to call Cherokee 39J then attempted to call Bonanza 18N. The transmission to Bonanza 18N occurred a slight instant after the collision. It appears that Cherokee 39J was below and in front of Bonanza 18N and could not be seen by Mr. Young. Cherokee 39J crashed and Mr. Bibler and the student were killed. Mr. Young safely executed a forced landing of Bonanza 18N in a nearby field (A. 4-12).

After trial to the Court, the District Court implied that the approach controller was negligent in failing to warn Bibler or the tower controller of the converging paths of Cherokee 39J and Bonanza 18N (A. 28) and in failing to advise Cherokee 39J to contact the tower local controller at the outer marker (A. 30). However, the District Court further found that Mr. Bibler was contributorily negligent in failing to maintain two-way communications with the control tower and in failing to contact the tower once he passed the outer marker (A. 34). Negligence on the part of the approach controller was assumed (A. 28). Mr. Young was found not negligent (A. 34).

The Sixth Circuit Court of Appeals affirmed the District Court's determination that Mr. Bibler was contributorily negligent, doing so in part as a matter of law (A. 14) and in part as a finding of fact supported by the weight of the evidence (A. 15) and that such negligence was a proximate cause of the collision (A. 17-18). The Sixth Circuit Court of Appeals also assumed that the approach controller was negligent (A. 18) and determined that Mr. Young (Bonanza 18N) had the right of way under Title 14

C.F.R., Section 91.67 (f). By virtue of Mr. Bibler's contributory negligence, all plaintiffs' claims were dismissed as required by Ohio law (A. 15, 17-18).

OBJECTIONS TO GRANTING A WRIT OF CERTIORARI

1. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF OTHER COURTS OF APPEALS.

The District Court, in its opinion, made the following statements concerning the approach controller:

> "While it may be asserted that an agency of the defendant United States was also negligent in failing to instruct 39 Juliet to contact the Tower at the outer marker, such negligence cannot obsolve the plaintiff." (A. 30)
>
> * * *
>
> "It is true that Approach Control was the only entity that knew, at a time immediately prior to the accident, of the relative positions of the two planes. Beginning at 1503:47 it had precisely located 39 Juliet; at 1504:44 it had located 18 November. For a period of between three and four minutes Approach Control had the capability of noting that two planes were in a collision course. Ironically, Bibler's own contributory negligence in failing to contact Tower had the effect of retaining him on Approach Control's frequency. Approach Control could have instructed Bibler to take evasive action or it could have advised Tower to order Young to do the same.
>
> Approach Control's failure to do this, however, does not relieve Bibler from the effects of his contributory negligence through the doctrine of last clear chance. . . ." (A. 31-32)

The Sixth Circuit Court of Appeals also recognized that the approach controller at Port Columbus had been negligent by stating:

> "He (the District Judge) also held that the approach controller at the Port Columbus Airport was guilty of negligence for failing to tell pilot Bibler to contact local control. But he held that this negligence was not the proximate cause of the accident." (A.3)

The above quotations from the opinions of the District Court and the Sixth Circuit Court of Appeals demonstrate that both Courts judged the conduct of the approach controller by the same standard of care which has been explicitly stated in the cases cited by Petitioners. The apparent reason why the lower Courts did not further expound on that standard is the findings both as a matter of fact and as a matter of law that Mr. Bibler was contributorily negligent. This pivotal contributory negligence issue also distinguishes this matter from most of the cases cited by Petitioners and explains why there should be no review of the judgments below. (A. 12, 15 and 33)

The case of *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62 (D. C. Cir. 1955), *aff'd. subnom., United States* v. *Union Trust Co.*, 350 U.S. 907 (1955), involved a claim for the wrongful causing of the death of passengers on an Eastern Airlines DC-4 who were killed as the result of a collision between the DC-4 and a P-38 military aircraft. There was no defense of contributory negligence to the claim for the deaths of the passengers. The passengers were passive participants in a tragic event. Both aircraft had been cleared for the same runway at the same time. The judgment against Eastern Airlines was reversed and remanded for a new trial. The United States, however, was found negligent for the breach by the air traffic

control personnel of their duty to warn each aircraft of the other's presence. This duty is identical to that recognized by the District Court and quoted above.

The case of *Indian Towing Company, Inc.* v. *United States*, 350 U.S. 61 (1955), states the same principle. This Court held that the coast guard had the duty to use due care in operating a lighthouse, and, if the light became extinguished, it had the duty to use due care to discover that the light had been extinguished and to give a warning of such to appropriate persons. Again, this is the same standard recognized by the lower Courts as quoted above.

The case of *Ingham* v. *United States*, 373 F. 2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967), also involved claims for the wrongful causing of the death and for injuries to passengers on a commercial airliner which crashed at Idlewild International Airport. Suit was brought against both Eastern Airlines and the United States. Two test cases were tried: one against Eastern Airlines and one against the United States. The claim was that the air traffic controllers had a duty to warn the pilots of the airliner about a crucial change in weather conditions. The trial court held that there was such a duty. The Court of Appeals went further and specificially found that such failure was a violation of the F.A.A.'s Air Traffic Control Procedure Manual which provided that the controller should give advice as to weather conditions and subsequent changes as necessary. Again there was no defense of contributory negligence to the claims made in that case.

United States v. *Furumizo*, 381 F. 2d 965 (9th Cir. 1967), involved a claim for the wrongful causing of the death of a student pilot who died when the small plane in which he was riding crashed after it had encountered wake turbulence caused by the take-off of a large aircraft. The Court of Appeals noted that the pilot in command had a

duty of avoiding the danger of wake turbulence and also demonstrated that the instructor in command of the small plane had been found negligent. The Court of Appeals also affirmed the District Court's finding that the student had not been negligent. Affirming the judgment against the United States, the Court held that the controllers' job required that they act in the interest of safety and warn a pilot whom they observe is taking off when it is apparent to such controllers that the pilot will encounter a severe hazard.

The case of *Hartz* v. *United States*, 387 F. 2d 870 (5th Cir. 1968), involved claims for the wrongful causing of the death of the pilot, Mr. Hartz, and the death of a passenger, Mr. Roth, who were killed when their Beechcraft Bonanza encountered wake turbulence created by the take-off of a DC-7. One of the issues in the case was the negligence of the pilot, Mr. Hartz. There was no issue as to any negligence on the part of the passenger, Mr. Roth. The District Court held that the controller had no duty to do anything more than maintain separation of aircraft to avoid a collision and that the negligence of Mr. Hartz was the sole proximate cause of the crash. Such holding prevented recovery by the passenger, Mr. Roth. On review, the Court of Appeals held, at page 874 of the opinion:

> "We hold that the controller gave Hartz a warning which was neither sufficient under the manual nor adequate to caution Hartz of a possible danger which was then known to the controller. The failure of the controller to properly caution Hartz of the possible danger of wing tip vortex imposed upon the controller an additional duty to delay take-off clearance for the Bonanza for such period as was reasonably necessary to permit such turbulence from the DC-7

> to dissipate. The controller's breach of duty clearly was a proximate cause of the crash of the Bonanza. . . ."

Based on this holding, the Court of Appeals reversed and remanded for further proceedings not inconsistent with the opinion. The net result was that recovery could be had against the United States at least for the death of the passenger, Mr. Roth.

The case of *Spaulding* v. *United States*, 455 F. 2d 222 (9th Cir. 1972), involved claims for the wrongful death of Dorman D. Michelmore (pilot), John B. Michelmore (passenger and son of pilot) and Jack E. Spaulding (passenger). Neither of the passengers were pilots. A judgment was rendered in the trial court against all plaintiffs. Only the claims on behalf of the estates of the decedent passengers were appealed. The appellate court stated the duty of the air traffic controller as follows at page 226 of the opinion:

> "The air traffic controller is required to give all information and warnings specified in his manuals, and in certain situations he must give warnings beyond the manuals. This duty to warn is based on the simple tort principle that once the government has assumed a function or service, it is liable for negligent performance.
>
> The controller's duty to warn does not, however, relieve the pilot of his primary duty and responsibility. . . ."

Again, as in most of the above cases, there was no defense of contributory negligence to the claims for the deaths of the passengers.

The case of *Gill* v. *United States*, 429 F. 2d 1072 (5th Cir. 1970), also involved a claim for the wrongful death of two passengers. Claims for the death of those passengers

had previously been made against the estate of the decedent pilot and were settled. Suit was brought against the United States. The Court of Appeals affirmed the District Court's finding that the radar approach controller was negligent in furnishing "in-flight weather information which was inexact, incomplete and in all reasonable probability misleading." The Court remanded the case solely for determination as to whether, as an issue of fact, the pilot had been negligent, because, if so, under the law of Texas, the United States was entitled to a reduction of the judgment against it by one-half. In that case contributory negligence of the pilot was a significant factor even though the air traffic controllers had a duty to warn the pilot.

Finally, the case of *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964), involved claims for the wrongful causing of the deaths of passengers of a commercial airliner resulting from a collision between the airliner and an Air Force jet fighter. There was no contributory negligence defense to the claims for the deaths of the passengers.

The Court of Appeals held at pages 397-98 of the opinion:

> "A warning to others of dangerous flying activity being conducted by the government would have been a precaution dictated by the exercise of ordinary care. We therefore affirm the District Court's holding that it was negligence at the operational level of the government to fail to inform United of the details of the government's hazardous activity involved in the KRAM procedure prior to authorizing Flight 736 to travel into the area where such activity was likely to be encountered. . . ."

These Respondents respectfully submit that the opinions of both the District Court and the Sixth Circuit Court

of Appeals in this matter show that those Courts did apply the standard of care explicitly set forth in the cases reviewed above. What occurred in the District Court and the Court of Appeals in this matter is almost identical to what occurred in the District Court in *United States* v. *Furumizo*, 381 F. 2d 965 (9th Cir. 1967). In that case Baker Aircraft Sales, Inc. (Baker) was one of the appellants. Baker argued that the District Court made no finding that its pilot-employee, the instructor in the airplane, was negligent. The Court of Appeals agreed that there was no direct finding that Shima (the employee) was negligent. However, the Court of Appeals made the following comments and reached the following conclusion at page 969 of the opinion:

> "The trial judge thought that he had made such a finding, as is indicated by a colloquy between court and counsel on motion for a new trial. In that the court was mistaken, and such a situation would normally require a remand for further findings on the issue. Here, however, it is apparent from the record that the court intended to make the finding; presumably it would do so on remand. We think that such a remand is unnecessary here. All that Baker seeks, in relation to the first theory, is an opportunity to convince the trial judge that Shima was in fact fully informed about the danger of wake turbulence, thus showing that Baker was not negligent in employing him as an instructor. But if Baker succeeded in proving that, it would bring itself within the second theory, the one on which the case was tried. As the trial court said (paragraph 38):
>
> > 'Had Shima been an adequately trained pilot, and had he been adequately instructed and made fully aware of the dangers of large plane wake turbulence to small planes, the Court cannot believe that he would have taken off at the time and

> under the circumstances he did, the evidence indicating that he was a careful and prudent person, not one given to taking undue chances. A well-trained pilot, adequately schooled in the actual dangers to planes of the size of this Piper of turbulence created by planes of the size of the DC-8, would have done what the pilots of the C-47 did — wait until a reasonable time had elapsed to allow the most violent aspects of the turbulence to dissipate before taking off. * * *'.
>
> To have done anything else would certainly have been negligent. In substance, then, the trial court's findings do embody the second theory. Remand for a more specific finding would be a triumph of form over substance."

Likewise, the lower Courts in this matter did not make a specific finding that the duty to warn was breached by the approach controller. It is apparent, however, that both the District Court and the Sixth Circuit Court of Appeals considered the approach controller negligent in failing to follow the procedure set forth in the controller's manual and in failing to give appropriate warnings of the impending collision of which the approach controller was the only one in a position to know all the facts. Therefore, these Respondents respectfully submit that the decision of the Sixth Circuit Court of Appeals does not conflict with the decisions of other Courts of Appeals as to the standard of care required of government air traffic controllers.

2. THE INTERPRETATION OF TITLE 14 C.F.R., SECTION 91.87, ADOPTED BY THE COURT BELOW IS CORRECT AND DOES NOT CREATE ANY PROBLEMS FOR SAFE OPERATION OF AIR TRAVEL.

These Respondents respectfully submit that the interpretation given by the Sixth Circuit Court of Appeals to the term "control tower" as used in Title 14 C.F.R., Section 91.87 (b), is correct and in accordance with the general usage and understanding of that term by both the Federal Aviation Administration and experienced pilots through the useage of that term in the regulations and the Airman's Information Manual.

Title 14 C.F.R., Section 91.87 (b), provides:

> "No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States *unless two-way radio communications are maintained between that aircraft and the control tower.*" (Emphasis added.)

Plaintiffs' Exhibit 51, Airman's Information Manual, p. 1-1, (R. 4), gives the following definition:

> "AIR TRAFFIC CONTROL SERVICE (CONTROL) — A service provided for the purpose of promoting the safe, orderly, and expeditious flow of air traffic, including *airport*, *approach*, and *enroute air traffic control service*." (Emphasis added.)

Finally, Plaintiffs' Exhibit 51, Airman's Information Manual, p. 1-84, (R. 4), provides:

> "LANDING — TOWER-CONTROLLED AIRPORTS — 1. When operating to an airport where traffic control is being exercised by a control tower,

pilots are required to maintain two-way radio contact with the tower while operating within the airport traffic area unless the tower authorized otherwise. Initial call-up should be made about 15 miles from the airport. (see 'Decrease Frequency Congestion' under GOOD OPERATING PRACTICES)

2. When necessary, the *tower controller* will issue clearances or other information for aircraft to generally follow the desired flight path (traffic patterns) when flying in the airport traffic area/control zone, and the proper taxi routes when operating on the ground. . . ." (Emphasis added.)

The Airman's Information Manual defines the term "Air Traffic Control Service" (ATC) as including three functions: airport traffic control service, approach traffic control service and enroute traffic control service. Further, in reference to Section 91.87 (b), the Airman's Information Manual specifically interprets the term "control tower" as being the "tower controller". Consequently, the information available to all pilots and the knowledge with which pilots are charged clearly supports the Sixth Circuit Court of Appeals' determination that the term "control tower" meant the "local controller". See *Stanley* v. *United States*, 239 F. Supp. 973, 975 (N.D. Ohio E.D. 1965).

In addition, these Respondents submit that simply having one's radio tuned to a particular frequency is not "radio communications" within the meaning of Title 14 C.F.R., Section 91.87 (b). Petitioners repeatedly argue that Mr. Bibler, by having his radio tuned to the approach control frequency, was in "contact" with the "control tower". Section 91.87 (b) does not simply require "contact". It requires "communications". The findings of fact of the District Court as quoted in the Sixth Circuit of Appeals' opinion clearly demonstrate that Mr. Bibler did not main-

tain "communications". According to those facts, a period of approximately four (4) minutes passed during which Mr. Bibler spoke to no one. The District Court found:

> "At 1503:17, 39 Juliet was noted by approach control as 'on the localizer' a mile from the marker." (A. 8, 24)
>
> * * *
>
> "At 1507:45, 39 Juliet knew he was inside the outer marker since he advised approach control 'a beam of Western Electric.' No conversation at any time in this approach was had with local control." (A. 11 and 28)

Anyone can sit by a silent radio and in a very technical sense be in contact with the party at the other end. Such silent contact, however, should not be considered "communication" in a circumstance where the very purpose of the radio contact is for the communication of information designed to protect all the parties concerned.

Respondents respectfully submit that the lower Courts have properly interpreted Title 14 C.F.R., Section 91.87 (b), as it existed at the time of the accident and that the findings of fact, which petitioners do not dispute, show a clear violation of that regulation. Therefore, the decision of the Sixth Circuit Court of Appeals does not create any problems which will affect the safe operation of air travel.

3. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION AND APPLICATION OF TITLE 14 C.F.R., SECTION 91.67.

The facts recited by the Sixth Circuit Court of Appeals and which are relevant to this objection are as follows:

> "At the time and place concerned Young had a clearance to land and was proceeding according to it. Bibler did not have a clearance to land; he had only a clearance to approach." (A. 18)

> "At 1503:47 he (Bibler) was advised that he was on the localizer one mile from the outer marker and spaced in reference to a Lake Central Nord three miles north of the airport. The term 'spaced in reference to Lake Central Nord' is not a clearance to land nor is it a landing sequence." (A. 11)

Plaintiffs' Exhibit 51, Airman's Information Manual, p. 1-1, (R. 4) provides:

> "Approach Sequence — the order in which aircraft are positioned while awaiting approach clearance or while on approach."

There is no dispute as to the fact that Cherokee 39J (Bibler) never did intend to land on Runway 28 Left. At no time was he on "final approach to land" or "landing". He was only sequenced behind the Nord (A. 11).

It appears that Petitioners completely missed the basis upon which the Sixth Circuit Court of Appeals concluded that Mr. Young had the right of way over Mr. Bibler. Paragraphs (e) and (f) of Title 14 C.F.R., Section 91.67, contain three sentences (A. 1). Each of those sentences

apply to different situations. Paragraph (e) is very general providing that an aircraft which is being overtaken has the right of way and that the overtaking aircraft shall alter course to the right. By its very nature, this provision indicates that it applies to enroute flight. It would not be logical to suggest that the second of two aircraft approaching the same runway should pass to the right. It would be more logical to provide for some other maneuver.

The first sentence of paragraph (f) specifically gives the right of way to an aircraft "on final approach to land" or "landing" (A. 1). The second sentence of paragraph (f) specifically provides for the situation where two (2) or more aircraft are approaching an airport for the "purpose of landing". If Mr. Bibler, who had no intention of landing at any time, is to be treated, as Petitioners infer, as if he were on final approach to land, then there is no reason for the distinction provided in the two sentences contained in Title 14 C.F.R., Section 91.67 (f). Thus it is apparent that the Sixth Circuit Court of Appeals based its decision that Mr. Young had the right of way on the specific and clear provisions of the first sentence of paragraph (f) rather than the note to Title 14 C.F.R., Section 60.14, as Petitioners claim. Further, the cases cited by Petitioners are distinguishable on the facts.

In *United States* v. *Miller*, 303 F. 2d 703 (9th Cir. 1962), Miller, who was piloting a Beechcraft had been cleared by radio to enter the traffic pattern but had not received a clearance for landing. The other aircraft, a Cessna, was doing touch and go landings. The Cessna was receiving instructions by means of light signals flashed with a light from the tower. At the time of the collision, it appears neither aircraft had been cleared. Consequently, the Court applied the general right of way regulation contained in paragraph (e) of Title 14 C.F.R., Section 91.67.

In *New York Airways, Inc.* v. *United States*, 283 F. 2d 496 (2d Cir. 1960), the aircraft involved was a helicopter which could safely stop its movement (hover) and make any maneuver desirable in order for the pilot to be assured that the spot on which he intended to land was free of surface vehicles. No right of way regulation was involved in that case.

In *George* v. *American Airlines, Inc.*, 295 F. 2d 311 (7th Cir. 1961), the two (2) aircraft were converging at approximately forty-five (45) degrees. The pilot of the defendant's aircraft did not see the other military aircraft until it was about "five seconds" away. In taking evasive action to avoid a collision, the pilot put the defendant's airliner into a dive resulting in injury to the plaintiff. The Court determined that the defendant was negligent because of the pilot's failure to maintain a proper lookout. There is no question of right of way nor is there any indication that, had the United States been sued, the crew of the military aircraft would not have been found negligent also.

Petitioners also argue that Mr. Young had an obligation to see Mr. Bibler's airplane. Respondents respectfully submit that Mr. Bibler also had an obligation to see Mr. Young's airplane. The facts as recited by the District Court and the Sixth Circuit Court of Appeals show that for a substantial period prior to the collision, the two (2) aircraft were converging from a spread of two (2) miles separation north to south at the approximate point of the outer marker to the point of the collision a slight distance short of the runway (A. 9-10).

Having been cleared to land, Mr. Young was obligated by Title 14 C.F.R., Section 91.75, to proceed directly to the runway and land. In fact, he was prohibited from doing otherwise. The significance of a clearance to land is explained in *Eastern Air Lines* v. *Union Trust Co.*, 221

F. 2d 62 (D.C. Cir. 1955), at page 65, in footnote 3, as follows:

> "The Administrator of Civil Aeronautics was called by the court as a witness on the meaning of the phrase 'cleared to land.' He testified that when a plane in the traffic pattern of an airport is 'cleared to land,' the pilot of the plane is thereby authorized to commence his landing approach operation immediately; in other words, when a pilot receives that clearance, wherever he may be in the traffic pattern, there is no plane ahead of him and he may make his turn at his discretion and consistently with the safe management of his plane, and may come in and land at once on the runway which has been designated by the tower. That this is the only meaning of the phrase 'cleared to land' was the unanimous testimony of all the certified air traffic controllers who testified on the subject. The trial judge instructed the jury as a matter of law that such was the meaning of the phrase 'cleared to land'."

Having received a clearance and in view of the obligation Mr. Bibler had to maintain communications with the control tower, Mr. Young had the right to assume that the aircraft "coming up on the marker," would contact the control tower and not be negligent. This conclusion is based on the rule set forth in *Svoboda* v. *Brown*, 129 Ohio St. 512, 196 N.E. 274 (1935), in the eighth paragraph of the syllabus as follows:

> "One may rightfully assume the observance of the law and the exercise of ordinary care by others, and action by him in accordance with such assumption in the absence of notice or knowledge to the contrary is not negligence."

See also *Hood* v. *New York, Chicago & St. Louis Rd. Co.*, 166 Ohio St. 529, 144 N.E. 2d 104 (1957); *Chambers* v.

McFerren, 168 Ohio St. 398, 155 N.E. 2d 917 (1959); *Ricks* v. *Jackson*, 169 Ohio St. 254, 159 N.E. 2d 225 (1959).

By virtue of Title 14 C.F.R., Section 91.87 (b), both Mr. Bibler and Mr. Young were required to *maintain* communications with the control tower when within the airport traffic area. Mr. Young, even though being told of an aircraft coming up on the marker, had a right to assume that Mr. Bibler would establish and maintain communications with the control tower. Had Mr. Bibler done so, Mr. Young would have heard the transmissions to and from Cherokee 39J and could have done something to avoid the collision. Mr. Young had no knowledge of the entrance of Cherokee 39J into the airport traffic area which would have permitted Mr. Young to take action to avoid the collision. Consequently, Mr. Young was not negligent for his failure to see Cherokee 39J.

Respondents respectfully submit that the F.A.A. regulations and the law of Ohio were correctly applied by the Sixth Circuit Court of Appeals and that there is no conflict between that decision and decisions of other Courts of Appeals as to the proper interpretation of Title 14 C.F.R., Section 91.67.

4. A WRIT OF CERTIORARI IS NOT TO BE GRANTED TO GIVE THE DEFEATED PARTY ANOTHER HEARING ON THE FACTS.

Even if the writ of certiorari were granted in this matter, Petitioners would gain no benefit unless this Court were willing to review the evidence, the findings of fact and the conclusions of law made by the District Court as to

Mr. Bibler's contributory negligence. This Court has indicated that a writ of certiorari will not be granted for that purpose.

In *Boehmer* v. *Pennsylvania Railroad Company*, 252 U.S. 496, 40 S. Ct. 409, 64 L. Ed. 680 (1920), *certiorari granted*, 248 U.S. 554, 39 S. Ct. 10, 63 L. Ed. 419, *affirming*, 252 F. 553 (2d Cir. 1918), this Court held at page 498, 40 S. Ct. at 409, 64 L. Ed. at 684:

> ". . . we accept the concurrent judgment of the lower courts that the carrier was not negligent in failing to give warning concerning the use of cars with handholds only at two diagonal corners. Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence. *Chicago Junction Ry. Co.* v. *King*, 222 U.S. 222."

Then in *Magnum Co.* v. *Coty*, 262 U.S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1923), this Court stated at page 163, 43 S. Ct. at 532, 67 L. Ed. at 924:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeal was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these limitations upon our issue of the writ."

These Respondents respectfully submit that the primary purpose for which Petitioners seek a writ of certiorari in

this matter is to obtain another opportunity to argue the facts and the law as they relate to Mr. Bibler's contributory negligence. This Court has already indicated by the above cited cases that the writ of certiorari is not available for that purpose. Therefore, Petitioners' petition should be denied.

CONCLUSION

These Respondents respectfully submit that the decision of the Sixth Circuit Court of Appeals does not conflict with any decision of any other Court of Appeals on any point of law, that said Court's interpretation of Title 14 C.F.R., Section 91.87, is correct and does not create any problems for safe operation of air travel and that a writ of certiorari is not to be granted for the purpose of giving the defeated party another hearing.

Wherefore, these Respondents pray that the petition for a writ of certiorari to the Sixth Circuit Court of Appeals be denied.

Respectfully submitted,

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